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In the Supreme Court of the United States

OCTOBER TERM, 1982

LEONARD B HEBERT, JR. & CO., INC., ET AL.,
PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that information requested by the Union from petitioners regarding their relationship with certain non-union contractors was relevant to the Union's duties as collective bargaining representative.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 696 F.2d 1120. The decision and order of the National Labor Relations Board (Pet. App. C1-C42, D1-D9) are reported at 259 NLRB 881.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1983 (Pet. App. A1). A petition for rehearing was denied on April 1, 1983 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on May 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are construction contractors and members of the New Orleans District Associated General Contractors of Louisiana, Inc. ("AGC"). Since at least 1971, petitioners have used AGC to bargain with the Carpenters District Council of New Orleans Vicinity and Local Union 1846 ("the Union") (Pet. App. C6; Tr. 23).[1] In the 1971 and 1974 contract negotiations, the Union unsuccessfully attempted to include in its collective bargaining agreements with the petitioners a subsidiary clause under which the agreements would have been applicable to any other construction firms operated by petitioners. The purpose of the subsidiary clause would have been to cover any non-union "double-breasted" operations maintained by petitioners.[2] For a period after 1974, the Union did not negotiate for a subsidiary clause because it lacked sufficient information to confirm any double-breasted operations (Pet. App. A7, C9; Tr. 53-55, 69-70).

In January 1979, the Union was involved in a representation election for a carpenters' unit at Claiborne Builders, Inc. Claiborne's site was also the site of another construction contractor that belonged to the AGC and was a party to the bargaining agreement with the Union. While at the site, the Union representatives were told by a representative

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[1] "Tr." refers to the transcript of the hearing in the unfair labor practice proceeding. "JX" refers to the parties' joint exhibits.

[2] A double-breasted "operation is one allowing an employer to compete for both union and non-union work. For instance, a subcontractor will operate two corporations, one hiring strictly union employees; the other, non-union employees. The former will bid on jobs from general contractors who utilize only unionized subcontractors; the latter bids only on work from general contractors who use non-union workers. * * * A double-breasted operation may or may not violate a labor contract" (Pet. App. A4 n.1). See *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976).

of the AGC contractor that the contractor had established Claiborne as a non-union subsidiary for the purpose of competing against the double-breasted operations of other AGC members (Pet. App. C10-C12; Tr. 19-22, 26-29). In addition, the Union had received other reports of double-breasting by AGC members. One Union agent reported seeing construction equipment bearing the name of petitioner Leonard B. Hebert Jr. & Co. at the jobsite of a non-union contractor. An affiliation between Hebert and a non-union contractor, Professional Construction Services, was confirmed to the Union by one of Hebert's superintendents. (Pet. App. C9; Tr. 34-37.) Employees of petitioner Boh Brothers also informed the Union when they relinquished their union membership that they were working for a Boh Brothers non-union operation, Broadmoor Corporation. Thereafter, a Union official observed former members working at a Broadmoor construction site. (Pet. App. C9; Tr. 36-37.)

Based on this information, the Union in early 1980 sent a letter to each petitioner requesting answers to 13 questions concerning possible double-breasting (Pet. App. C14-C16; JX 3). The letter explained that the purpose of the request was to enable the Union to determine whether petitioners were in violation of the collective bargaining agreement by reason of possible operation of non-union subsidiaries (Pet. App. C14).[3] None of the petitioners provided the requested information (Pet. App. C16).

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[3]Each letter read as follows (the designation "[ ]" replaces the name of the non-union contractor thought by the Union to be affiliated with the particular addressee):

> Gentlemen:
>
> It has come to my attention that your Company is, or may be, in violation of the collective bargaining agreement with this Union, by reason of the operation of your Company or its principals, of

In the meantime, bargaining between the AGC and the Union had commenced concerning the contract due to expire on April 30, 1980. During the negotiations, Robert Boh, President of AGC and of Boh Brothers Construction Company and chairman of the contractors' negotiation committee, commented disparagingly on both the Union's letter and the unfair labor practice charge it had filed. In response, the Union's Executive Secretary stated that he was still waiting for an answer to the request for information. (Pet. App. C17-C18.)

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another company called [ ], or by the performance of work which would otherwise be performed by your Company.

Specifically, we believe that there is or may be a violation of the collective bargaining agreement, including the articles on wages, scope of agreement, referral clause, fringe benefit provisions and recognition and possibly other articles. [ ] is presently performing the same services that were previously performed by your Company with your employees. In addition, we believe that there is a connection between your Company and [ ], either financially or through management personnel, or both, and we believe that the object of creating [ ] was to circumvent the provisions of our collective bargaining agreement.

This information is necessary and relevant to the Union's administration of the contract, and in furtherance of its duty of fair representation to all members. We would appreciate your preparing answers to the following questions:

1. What positions in [ ] are held by each officer, shareholder, director or other management representative of your Company?

2. State the name of each person who has a function related to labor relations for your Company and for [ ].

3. What customers of [ ] are now or were formerly customers of your Company?

4. State the difference, if any, in the type of business engaged in by your Company and [ ].

5. What services, including clerical, administrative, bookkeeping, managerial, engineering, estimating, or other services are performed for [ ] by or at your Company?

2. Pursuant to the Union's charge, the Board found that petitioners violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to supply the requested information (Pet. App. D2-D3, C36-C37). The Board stated that "it is clear from the record that the Union needed and sought the said information to police the existing agreement and to prepare for bargaining negotiations" (Pet. App. D4). Thus, as noted by the Administrative Law Judge (ALJ) in the decision affirmed by the Board, "the data sought provided information as to whether a single employer situation existed or whether the employer had assigned or contracted work to the other enterprise and therefore served the purpose of assisting the Union by supporting its contention that the employer as a single employer

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6. What supervisory functions are performed by employees of your Company over employees of [ ]?

7. What insurance or other benefits are shared in common by employees of your Company and the employees of [ ]?

8. What skills do the employees of [ ] possess that employees of your Company possess?

9. Please list all former employees of your Company that are now employed by [ ] and their job titles.

10. State whether [ ] is a member of the Associated General Contractors of Louisiana, Inc.

11. Does [ ] have separate contractor license, bank account, books, insurance policies, tax returns than your Company?

12. Was there any leasing of equipment between the two companies during the last year and was it done by written agreement?

13. Was there any interchange of employees in the field during the last year between the two companies?

Please submit the information within ten days of the date of this letter.

Very truly yours,

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY

with the other company was not meeting contractual obligations, *e.g.* wage scale and union security * * *" (Pet. App. C27-C28, citing *Doubarn Sheet Metal, Inc.*, 243 NLRB 821 (1979)). The ALJ also pointed out that the Board in *Doubarn* had rejected the proposition that "the Union was obliged to demonstrate actual instances of contractual violations as a condition precedent to the employer's obligation to provide the information" (Pet. App. C28).

In addition, the ALJ determined that the evidence obtained by the Union that petitioners might be forming double-breasted operations was more than "mere speculation or suspicion." The ALJ stated that "coming from several sources, including an employer party to the contract and at that time member of the AGC, * * * the information was such as to warrant the inference that the Union * * * entertained *bona fide* questions concerning the existence and nature of related operations of the [petitioners]." (Pet. App. C29-C30.) The ALJ found "unconvincing" petitioners' assertion that the Union sought the information for organizational purposes (*id.* at C31).

Accordingly, the Board ordered petitioners, *inter alia*, to furnish to the Union the requested information (Pet. App. C38, C40, D2-D3, D7-D8).

3. The court of appeals upheld the Board's decision and enforced its order. The court agreed with the Board that the Union had established the relevancy of the information sought. The court pointed out, citing *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 437 (1967), that "a disclosure request is examined under a liberal, discovery-type standard" (Pet. App. A18-A19). The court noted that the Union "had numerous indications (before it made its request) that several member/employers of AGC-New Orleans had created double-breasted operations to evade contractual obligations toward the Union" (*id.* at A14). The court

added that "the type of information sought by the Union would assist it in confirming its suspicions and thereby allow it to make an informed choice whether to pursue legal means by which it could hold the non-union companies to the terms of the collective bargaining agreements involved here" (*id.* at A15). The court further found that the "evidence acquired by the Union before it requested the information * * * formed a reasonable basis for further investigation" (*ibid.*) and that "the letters [sent by the Union to petitioners] set forth sufficient background information about the focus and nature of the Union's inquiry to put the employer/addressee on notice of the basis of the Union's suspicion concerning double breasting" (*id.* at A10 n.3). Judge Garwood dissented on the ground that the Union's evidence of double breasting was insufficient as to certain of the petitioners (*id.* at A22-A28).

ARGUMENT

It is well established that an employer has an obligation "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-436; (1967); *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 303 (1979). These duties include both the enforcement of an existing collective bargaining agreement (see *NLRB* v. *Acme Industrial Co., supra*) and the negotiation of future agreements (see *NLRB* v. *Truitt Mfg. Co., supra*). Where, as here, the information sought does not relate directly to such central bargaining issues as wages, hours, or working conditions, the union must show that, under a liberal "discovery-type standard" (*NLRB* v. *Acme Industrial Co., supra*, 385 U.S. at 437), the requested information is relevant to its duties.

Petitioners do not dispute these settled principles. Rather, they contend in various formulations that the Union failed

to establish the relevancy of its request. In essence, this is no more than a challenge to the court of appeals' conclusion that the Board's finding of relevance was supported by substantial evidence. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). See also *NLRB* v. *Truitt Mfg. Co., supra*, 351 U.S. at 153-154 (issue turns on "circumstances of the particular case"). In any event, there is no merit to petitioners' contention.

As shown above (pp. 2-3, *supra*), the Union, prior to making its information requests, had received numerous reports that petitioners were operating non-union subsidiaries doing work apparently covered by the collective bargaining agreements. The information sought would enable the Union to determine whether petitioners' non-union operations were covered by the Union contracts, and thus was plainly relevant to the administration of those contracts.[4] Moreover, whether or not the non-union operations violated the contract, reliable information concerning their suspected proliferation would affect whether the Union should revive and press its position for a subsidiary clause.[5]

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[4]Where the two companies are so interrelated as to constitute a "single employer" and their employees share a sufficient community of interest to constitute a "single bargaining unit," a collective bargaining agreement signed by the unionized company "is binding on the single employer as a whole, and the employer is obligated to give effect to the agreement as to all employees within the appropriate unit." *NLRB* v. *Don Burgess Construction Corp.*, 596 F.2d 378, 388 n.9 (9th Cir.), cert. denied, 444 U.S. 940 (1979), and cases cited. See also *Local 627, International Union of Operating Engineers* v. *NLRB*, 518 F.2d 1040, 1046 (D.C. Cir. 1975), aff'd on this issue *sub nom. South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976).

[5]The Board, upheld by the court of appeals, correctly rejected petitioners' contention (Pet. 39-42) that the Union's request was actually in pursuit of organizational aims. Petitioners assert (Pet. 33-34) that,

Contrary to petitoners' contention (Pet. 16-17), the court of appeals was plainly correct in concluding that the letters sent by the Union to petitioners fully apprised them of the basis for inquiring into their non-union operations. Each petitioner received an individual letter stating in its preface that the Union believed the petitioner to be in possible violation of the bargaining agreement by the operation of a named non-union affiliate. Each letter specified the particular contractual provisions the Union sought to police, alleged financial or managerial connections between the petitioner and the non-union operation, and explained the Union's basis for asserting a right to the information.

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because the Union had long maintained a collective bargaining relationship without requesting the information now sought, the information could not be relevant to the Union's representational functions. This argument ignores the ever-increasing evidence of double breasting received by the Union prior to its information requests. Moreover, contrary to petitioners' assertion (Pet. 35-36), the Board found that the Union *had* asserted its right to the requested information during negotiations. The legitimacy of the Union's information request is not belied by the facts, relied upon by petitioners (Pet. 37-38), that the Union already believed that Perrilliat-Rickey Construction Co., not a party to this case, operated in a double breasted manner, or that the Union had filed a lawsuit against one of petitioners, Pratt Farnsworth, Inc., alleging it to be a single employer with a non-union construction company. What the Union knew about Perrilliat-Rickey is simply irrelevant to this case; and the Union was entitled to supplement and verify the information it had about Pratt Farnsworth. . Moreover, neither of these facts negates the relevance of the information sought from all of the other petitioners. Finally, the contention (Pet. 39-41) that the Union could have obtained the same information by filing a grievance or a unit clarification petition with the Board is completely without merit. A Union is entitled to obtain information to enable it to make a judgment whether to go forward with formal charges. A contrary rule would reduce a union's statutory rights to " 'a game of blind man's bluff' " and has been rejected by this Court. *NLRB* v. *Acme Industrial Co., supra*, 385 U.S. at 438 n.8, quoting *Fafnir Bearing Co.* v. *NLRB*, 362 F.2d 716 (2d Cir. 1966).

The cases relied on by petitioners (Pet. 17-18) do not aid their contention that, because the Union did not support its request with detailed evidence of contractual violations, it was not entitled to the information sought. Rather, these cases hold that it is sufficient that a union have reasonable grounds for a discovery-type request and the employer be apprised of the relevancy of the information to the union's concerns. See *NLRB* v. *Acme Industrial Co., supra*, 385 U.S. at 437-438.

Petitioners principally rely (Pet. 17) on *NLRB* v. *Associated General Contractors, Inc.*, 633 F.2d 766 (9th Cir. 1980), cert. denied, 452 U.S. 915 (1981), and *San Diego Newspaper Guild* v. *NLRB*, 548 F.2d 863 (9th Cir. 1977). Those cases do not conflict with the decision below. In *Associated General Contractors*, the Ninth Circuit held that the unions could demonstrate relevancy as to possible contract violations by "establish[ing] a reasonable basis to suspect such violations have occurred. Actual violations need not be established in order to show relevancy" (633 F.2d at 771). Applying that standard, the court upheld the Board's order requiring disclosure based on the union's evidence of possible double breasting (633 F.2d at 769). As the court below correctly noted (Pet. App. A12), that case "is virtually indistinguishable" from the present one and does not create a conflict. *San Diego Newspaper Guild* also is not in conflict. There, the Board had found in favor of the employer, and was sustained by the court of appeals, on the ground that the union "must offer more than mere 'suspicion or surmise' for it to be entitled to the information. * * * [T]he Union's claim of relevance and need fails as it is apparently grounded only upon the union's suspicion * * * [which] has been shown by the record before the Board to be totally unfounded" (548 F.2d at 868, 869). At the same time, however, the court observed that "to require an initial, burdensome showing by the Union before it can gain access

to information which is necessary for it to determine if a violation has occurred defeats the very purpose of the 'liberal discovery standard' of relevance which is to be used. * * * [We] require some initial, but not overwhelming, demonstration by the union that some violation is or has been taking place * * * [and] great weight should be given the Board's determination on this issue" (548 F.2d at 868-869). Here, as in *Associated General Contractors* and unlike *San Diego Newspaper Guild*, the Union has "shown an objective basis for [its] suspicions * * *, [and] the record before the Board did not show their suspicions to be totally unfounded" (633 F.2d at 771 n.6).[6]

Lastly, petitioners assert (Pet. 27-31) that, assuming relevance was established as to petitioners Boh Brothers and Hebert, substantial evidence does not support the finding of relevance as to the other eight petitioners. This question,

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[6]Contrary to petitioners' contention (Pet. 18), the Board in *Doubarn Sheet Metal, Inc.*, 243 NLRB 821, 824 n.13 (1979) did not "by inference" hold that letters similar to those here would not be sufficient to establish relevance. As noted by the Administrative Law Judge (Pet. App. C26-C28), the facts in *Doubarn*, where the Board upheld an information request, are almost "identical" to those in this case. The Board there found that a request had to be supported by something more than "mere speculation or suspicion." However, the union there had no more information of suspected contractual violations than did the Union here (Pet. App. C29 n.5). Moreover, although a union has an obligation to establish the relevancy of its request, the cases on which petitioners rely do not support their apparent contention (Pet. 16-18) that the Union was obligated to supply petitioners with all the evidence to buttress its belief that the contract was being violated. Thus, in *Associated General Contractors, supra*, to which petitioners refer, the union made its information request to the employers by letters very similar to those here. See *Associated General Contractors*, 242 NLRB 891, 892-893 (1979). Finally, *NLRB* v. *Temple-Eastex, Inc.*, 579 F.2d 932, 937-938 (5th Cir. 1978), cited by petitioners (Pet. 16, 23-24), is inapposite. There, the court disapproved a finding of relevancy made by the Board on a different basis than that on which the union had requested the information from the employer.

however, only contests the court of appeals' fact-bound conclusion (Pet. App. A17 n.5) that the evidence was sufficient to give "the Union reason to believe there was double-breasting by most, if not all, of the member contractors of AGC-New Orleans."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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